

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 22, 2008 Session

STATE OF TENNESSEE v. WILLARD J. WALLACE, JR.

**Appeal from the Criminal Court for Sumner County
Nos. CR-1023-2006; CR-178-2007 Dee David Gay, Judge**

No. M2007-02381-CCA-R3-CD - Filed January 13, 2009

The defendant, Willard J. Wallace, Jr., appeals the Sumner County Criminal Court's order revoking his community corrections sentence and sentencing him to seven years in the Department of Correction as a Range I, standard offender. After reviewing the record, we affirm the judgment of the trial court but remand the case to the trial court for entry of a revised judgment of conviction on count 1 of the indictment, as detailed in this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed;
Case Remanded.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

John Pellegrin, Gallatin, Tennessee; Peter D. Heil, Nashville, Tennessee, for the appellant, Willard J. Wallace, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Thomas B. Dean, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that in December 2006, the Sumner County Grand jury indicted the defendant on two counts of possession of 0.5 grams or more of a Schedule II controlled substance (cocaine) with intent to sell or deliver, two counts of animal cruelty, one count of driving on a revoked license, one count of resisting arrest, and one count of felony weapons possession. In February 2007, the grand jury returned an additional indictment; in the later true bill, the defendant was indicted on one count of felony escape, one count of misdemeanor possession of a Schedule II controlled substance (cocaine), and one count of possession of drug paraphernalia. The indictments alleged that the offenses took place between October 2006 and January 2007. In March 2007, the defendant entered guilty pleas in the two cases. The defendant pled guilty to all counts of the February 2007 indictment; in the December 2006 indictment, the defendant pled guilty to two counts

of attempted possession of 0.5 grams or more of a Schedule II controlled substance (cocaine) with intent to sell,¹ one count of felony weapons possession, one count of driving on a revoked license, and one count of resisting arrest.² At a sentencing hearing, the trial court ordered some of the defendant's sentences to be served concurrently and some consecutively, resulting in a total effective sentence of seven years as a Range I, standard offender. The trial court ordered the defendant to serve his sentences on community corrections.

In April 2007, a community corrections violation warrant was issued against the defendant, alleging that he had failed to report to the local community corrections office as required. A hearing on the warrant was held on August 13, 2007. At the outset of the hearing, both parties stipulated that the defendant violated the terms of his community corrections sentence as alleged in the warrant. During their opening argument, both parties provided background information regarding the defendant's criminal history. As summarized by the state, in August 2006 the defendant "was arrested for agg[ravated] assault, possession of Schedule II with intent, driving under the influence, evading arrest as a felony, implied consent, having no driver's license, reckless endangerment, and attempted bribery of a public servant; all of those cases stemm[ed] from one particular incident." The defendant ultimately "pled guilty to a number of charges." The defendant was placed on probation but failed to report for meetings with his probation officer. This led to a series of events which resulted in the charges in the instant case.

In October 2006, the police arrested the defendant in connection with that warrant, at which time they discovered him with 4.5 grams of cocaine. This arrest resulted in the defendant being charged with the offenses alleged in the first three counts of the first indictment: two counts of animal cruelty and one count of possession of 0.5 grams of cocaine with intent to sell or deliver. In November 2006, while on bond, the police stopped the defendant's pickup truck. According to the state, the defendant was "found to be in possession of cocaine, a weapon, and a large amount of cash. The defendant [also] attempted to throw some of that evidence away and resisted arrest." That incident led to the defendant being charged with the other four offenses alleged in the first indictment. The remaining charges, constituting the three counts of the second indictment, resulted from the defendant's failure to return to the county jail after being furloughed so that he could attend a drug treatment program.

¹The record reflects that counts 1 and 6 of the indictment charged the defendant with possession of cocaine with intent to sell or deliver. In entering judgments of conviction, the trial court reflected the proper conviction offense of attempted possession on count 6 but did not denote the proper conviction offense on count 1. The trial court subsequently issued an amended judgment reflecting that the defendant was indicted on cocaine possession but convicted on attempted possession, but the revised judgment listed that it was amending the judgment on count 6—which was correctly entered the first time. We therefore remand the case to the trial court for entry of a revised judgment on count 1 reflecting the proper conviction offense.

²By agreement, the animal cruelty charges were dismissed.

After summarizing the defendant's criminal history, each party offered the testimony of one witness. The state's witness, Tim Sircy, testified that he was employed by Cumberland Mental Health as a criminal justice mental health liaison. He said that he interviewed the defendant after he had been jailed in connection with the alleged community corrections violation.³ Sircy testified that the defendant was "very friendly, very pleasant, very cooperative[,] and very forthcoming with information" during the interview. According to Sircy, the defendant reported that he had been using cocaine for over thirty years, and that the defendant's use was connected to his Crohn's disease. The defendant told Sircy that cocaine "ma[d]e him feel physically alive. It gave him energy and strength to go on" in response to the disease, which Sircy said "sap[s] you of . . . a lot of your energy and a lot of your zeal." Sircy said that the defendant indicated that he was unwilling to seek treatment and that he "would continue to use cocaine when he got out" of custody. The defendant reported that he did not worry about overdosing, as "he'd been using [cocaine] for a long time, and he was used to it." On cross-examination, Sircy said that the defendant did not appear suicidal or homicidal at the time of the interview.

The defendant testified that he graduated from Middle Tennessee State University with two undergraduate degrees, in behavioral psychology and aerospace engineering. He said that he also worked at his father's family business, a gasoline service station in east Nashville. The defendant described the business as a successful one and said that there were "no off days in our life." The defendant also said that "when we were in Davidson County, the mayor and the chief of police were friends of my father's . . . I held a police commission in Davidson County for 20 years and . . . I flew airplanes." The defendant said that he had "never" been in any trouble until about a year before the revocation hearing. He said that the state's opening statement accurately summarized his legal history.

The defendant testified that after he was released from jail, he went to live at a friend's house. He said that he did so because at the time, he and his wife were separated, and while he owned a home in Hendersonville in which he could have lived, he did not live there because he had no transportation and the house had no electricity. As such, he moved in with a friend, a truck driver, "four or five days [before] I was supposed to report." The defendant said that at the time, he had no driver's license, no transportation, and no phone, as his cellular phone had not yet been activated. The defendant explained that his cellular phone needed to be activated from a land line phone, but the friend had no land line at his house.

The defendant said that the day he was to report, his friend went "out of town and his cargo was not ready, and he had to stay overnight out of town. In other words, he didn't come home, and I was there by myself . . . [with] no way to go anywhere and no phone to call." The defendant said that he "didn't want to just take off walking or knocking on doors" in an attempt to contact anyone,

³Sircy's report, which was introduced as an exhibit at the hearing, indicates that the meeting took place on July 26, 2007.

but the next day, after his friend returned, he contacted his attorney and explained his predicament. The defendant said that when he was arrested in connection with the community corrections violation, he was not in possession of any drugs. The defendant emphasized that “drugs [were] not the reason why I did not call or did not come in. It was situational, purely situational. It was beyond my control.”

The defendant said that were he to be released from custody, he would be able to go to his house in Hendersonville, which had its electricity restored. He said that he would be able to afford cab fare from Hendersonville to Gallatin, which he said was approximately \$100 round-trip. The defendant said that he “most certainly” needed to be out of the penitentiary to resolve the court case regarding his mother’s estate. The defendant explained that his father “died and left me a few million . . . I’m in the interest and penalty phase of [my mother’s] estate, and it has not been settled. . . . I have to appear to settle the estate.” He also said that although he had sold his father’s service station, he needed to appear in court to help resolve a class-action lawsuit against Exxon in which his father was a plaintiff. The defendant said that “they owe me about half a million dollars, and they won’t settle it with anybody but me since it was rolled over from my father’s name into mine.”

The defendant noted that while cocaine “allowed me to make millions of dollars when I should have been in the bed sick,” and while he believed that cocaine was “not such a damnable drug if it’s used right,” he was confident he would be able to pass random drug tests were he to be released from jail. He said that he had previously participated in three drug rehabilitation programs but that he was unwilling to participate in another program. On cross-examination, the defendant said, “I’m going to get myself off [cocaine] . . . because I’m tired of being here.”

On cross-examination, the defendant testified that on the day he was to report to his community corrections officer, he did not knock on doors in his neighborhood in an attempt to use a telephone because “[t]hat’s not a smart thing to do.” The defendant denied using methamphetamine and said that if, during a jailhouse telephone call, he said that the drugs he took were laced with methamphetamine, he did not remember the call. He also said while he generally had “no problem” with law enforcement, he may have used some threatening language in describing police officers during his jailhouse phone conversations. He explained that the threatening language resulted from his frustration over a certain officer who “kept calling my wife and plugging for things that wasn’t there.”

At the end of the hearing, the trial court found that the defendant had violated the terms of his community corrections probation. Accordingly, on August 31, 2007, the trial court entered an order revoking the defendant’s community corrections probation and ordering him to serve his seven-year sentence in the custody of the Department of Correction. On September 12, 2007, the defendant filed a “Motion for New Hearing and for Arrest of Judgment” in the trial court, which denied the order on September 18, 2007. On October 17, 2007, the defendant filed a notice of appeal.

ANALYSIS

State's Argument that Notice of Appeal is Untimely

As an initial issue, the state argues that the defendant's notice of appeal was untimely filed and, therefore, the defendant has waived his stated issue on appeal. The defendant argues that his motion for a new hearing and arrest of judgment in this matter should "be construed [by this court] as a motion for new trial or motion for a suspended sentence so as to toll the time for filing a notice of appeal," thus making his appeal timely. In the alternative, the defendant argues that the rules regarding the timeliness of a notice of appeal should be waived in the interest of justice.

Pursuant to Tennessee Rules of Appellate Procedure 4(a), a notice of appeal "shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from[.]" There are certain motions that toll the time for filing the notice of appeal, including a motion for arrest of judgment. Tenn. R. App. P. 4(c). However, a motion for arrest of judgment may only be filed when "the indictment, presentment or information does not charge an offense" or when "the court was without jurisdiction of the charged offense." Tenn. R. Crim. P. 34(a)(1)-(2). The defendant's motion alleges neither of those grounds. Accordingly, although the defendant's motion is styled in part as a motion for arrest of judgment, we will not treat it as such. Furthermore, in his motion to waive timely filing of the notice of appeal, the defendant argues that his trial court motion "should properly [have] be[en] construed as a motion for new trial or a motion for a suspended sentence so as to toll the time for filing a notice of appeal." The defendant is correct that these motions would toll the limitations period. See Tenn. R. App. P. 4(c). However, the defendant's trial court motion does not conform to the rules for filing a motion for new trial or a motion for suspended sentence. See Tenn. R. Crim. P. 33 (motion for new trial); Tenn. R. Crim. P. 32(a), 35 (motion for suspended sentence). As such, we will not treat the defendant's motion as one for a new trial or suspended sentence.

We instead view the defendant's motion, in which he "request[ed] that the [trial] Court grant him a new hearing or, in the alternative . . . set aside its Order of August 31, 2007 pending further orders," as a motion to reconsider. However, a motion to reconsider is not among the specified motions that toll the thirty-day requirement. State v. Lock, 839 S.W.2d 436, 440 (Tenn. Crim. App. 1992) (citing State v. Bilbrey, 816 S.W.2d 71, 74 (Tenn. Crim. App. 1991)). Furthermore, this court has noted that our rules of criminal procedure do not provide for a motion to rehear or reconsider. State v. Ryan, 756 S.W.2d 284, 285 n.2 (Tenn. Crim. App. 1988). Thus, the notice of appeal in this case should have been filed within thirty days of the entry of the August 31, 2007 order revoking the defendant's probation.

The untimely filing of a notice of appeal is not always fatal to an appeal. As stated in Rule 4(a), "in all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such

document may be waived in the interest of justice.” Tenn. R. App. P. 4(a). The defendant has filed a motion requesting that this court waive the timely filing of the notice of appeal. “In determining whether waiver is appropriate, this court will consider the nature of the issues presented for review, the reasons for and the length of the delay in seeking relief, and any other relevant factors presented in the particular case.” State v. Markettus L. Broyld, No. M2005-00299-CCA-R3-CO, 2005 WL 3543415, at *1 (Tenn. Crim. App. Dec. 27, 2005); see also State v. Robert William Rockwell, No. E2006-01717-CCA-R3-CD, 2007 WL 2297817, at *2 (Tenn. Crim. App. Aug. 13, 2007); no perm. app. filed. Waiver is not automatic and should only occur when “the interest of justice” mandates waiver. Robert William Rockwell, 2007 WL 2297817, at *2. If this court were to summarily grant a waiver whenever confronted with untimely notices, the thirty-day requirement of Tennessee Rule of Appellate Procedure 4(a) would be rendered a legal fiction. Id.; see also Michelle Pierre Hill v. State, No. 01C01-9506-CC-00175, 1996 WL 63950, at *1 (Tenn. Crim. App. Feb. 13, 1996).

In this case, the defendant filed a motion to waive timely filing of the notice of appeal twelve days after the state filed its appellate brief in which it addressed the timeliness issue. In the motion, in addition to the arguments stated above, the defendant argues that he “is entitled to an appeal as of right from the trial court’s revocation of probation,” and that “[t]he record clearly establishes Defendant’s intent to appeal the revocation decision.” The defendant further notes that he “diligently gave the trial court the first opportunity to address the issue, and [he] filed a Notice of Appeal within thirty (30) days of the trial court’s October 18, 2008 Order.” Although these arguments in support of the defendant’s motion are not particularly cogent, two facts must be stated. First, the defendant, unlike some litigants faced with a similar situation, took responsibility for his procedural failings and filed a motion to waive the timeliness requirement. See, e.g., State v. Heather Massengill, No. E2006-02602-CCA-R3-CD, 2007 WL 2019462, at **1-2 (Tenn. Crim. App. May 12, 2008) (this court, refusing to waive timeliness requirement, dismissed appeal where defendant’s notice of appeal was untimely and defendant failed to seek waiver of the timeliness requirement); no perm. app. filed. Second, the notice of appeal was ultimately filed less than three weeks after the thirty-day period for filing the notice of appeal expired. Accordingly, we will waive the timeliness requirement in the interest of justice and consider this appeal on its merits.

Community Corrections Revocation

The decision to revoke a community corrections sentence rests within the sound discretion of the trial court and will not be disturbed on appeal unless there is no substantial evidence to support the trial court’s conclusion that a violation occurred. State v. Harkins, 811 S.W.2d 79, 82-83 (Tenn. 1991). Pursuant to Tennessee Code Annotated section 40-35-311(e), the trial court is required only to find that the violation of a community corrections sentence occurred by a preponderance of the evidence. In reviewing a trial court’s findings, this court must examine the record and determine whether the trial court has exercised a conscientious judgment rather than an arbitrary one. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991).

In this case, the defendant admitted that he failed to report to a meeting with his community corrections officer, as required under the terms of his sentence. However, the defendant argues that the trial court's ordering him to serve his sentence in the Department of Correction was too harsh a penalty given that he "negligently failed to arrange a dependable ride to his first probation meeting." The defendant argues that "the proper determination of this first-instance negligent failure to report was for the trial court to impose a sentence of split confinement, followed by a return to community corrections supervision under appropriate terms and conditions." However, the defendant cites to no case law or statutory authority to support his assertion. There is no rule requiring that the trial court give a community corrections participant what amounts to a free pass upon his first violation. See Tenn. Code Ann. § 40-36-106(e)(4) (2006). Accordingly, given that the defendant admitted to violating the terms of his community corrections sentence, and that the evidence supported the court's finding that defendant would not follow the conditions of his release, we cannot conclude that the trial court abused its discretion in revoking the defendant's community corrections sentence and incarcerating him. The defendant is denied relief on this issue.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed. The case is remanded to the trial court for the sole purpose of entry of revised judgments, as explained in this opinion.

D. KELLY THOMAS, JR., JUDGE